

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

ERIC R. BAHE, Custodian, CGM Roth  
Conversion IRA,

Plaintiff,

v.

FRANKLIN/TEMPLETON DISTRIBUTORS,  
INC., and WILLIAM J. LIPPMAN,

Defendants, and

FRANKLIN BALANCE SHEET INVESTMENT  
FUND,

Nominal Defendant.

Civil Action No. 04-11195 (MLW)

**PLAINTIFF'S UNOPPOSED MOTION FOR LEAVE TO FILE SUR-REPLY IN  
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Now comes the Plaintiff in the above referenced action and he hereby moves, pursuant to Local Rule 7.1(B)(3), that this Court grant him leave to file the accompanying Plaintiff's Sur-reply in Opposition to the Defendants' Motion to Dismiss Count I of the Complaint, in order to respond to arguments made, for the first time, in the Reply Memorandum of Defendants Franklin/Templeton Distributors, Inc. ("Distributors") and William J. Lippman (the "Reply Memorandum"). As grounds for this motion, Plaintiff states as follows:

1. On or about August 27, 2004, Defendants filed a motion to dismiss the complaint, along with a supporting memorandum of law and a Addendum Volume (collectively the "Motion to Dismiss"). On October 4, 2004, Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss was filed.

2. On or about November 3, 2004, Defendants filed the Reply Memorandum,

along with a multi-exhibit Supplemental Addendum Volume of Franklin/Templeton Distributors, Inc.

3. The Motion to Dismiss seeks dismissal of Count I of the Complaint, which states a claim against Distributors under §36(b) of the Investment Company Act of 1940 (the "ICA"). In the Reply Memorandum, the Defendant Distributors argues, for the first time, that NASD Rule 2830, promulgated by the National Association of Securities Dealers, supersedes §36(b) of the ICA. Since the Defendants did not make that argument in their initial submissions in support of the Motion to Dismiss, the Plaintiff had no opportunity to respond to it in his opposition papers.

4. Counsel for the Plaintiff has been advised by Counsel for the Defendants that the Defendants do not oppose the allowance of this motion.

THEREFORE, Plaintiff respectfully submits that this Court should grant him leave to file the accompanying Plaintiff's Sur-reply in Opposition to the Defendants Motion to Dismiss Count I of the Complaint, to provide him the opportunity to address the arguments raised for the first time in Defendants' Reply Memorandum.

Dated: November 23, 2004

Respectfully submitted by the attorneys for the Plaintiff,

/s/Edward F. Haber

Edward F. Haber (BBO No. 215620)  
Theodore M. Hess-Mahan (BBO No. 557109)  
Christine E. Morin (BBO No. 600237)  
SHAPIRO HABER & URMY LLP  
53 State Street  
Boston, MA 02109  
Tel. (617) 439-3939  
Fax (617) 439-0134

**OF COUNSEL:**

Robert C. Schubert, Esq.  
Schubert & Reed LLP  
Two Embarcadero Center  
Suite 1660  
San Francisco, CA 94111  
(415) 788-4220

**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(A)(2)**

I, Edward F. Haber, counsel for the Plaintiff, hereby certify that I conferred with Daniel A. Pollack, counsel for the Defendants, with respect to this motion, and attorney Pollack advised me that the Defendants do not oppose the allowance of this motion.

/s/Edward F. Haber